

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RALPH DOMINIC VACCARO,

Plaintiff,

v.

SELECT PORTFOLIO SERVICING INC.,

Defendant.

Case No. 18-cv-05111-HSG

**ORDER DENYING EX PARTE
APPLICATION FOR TEMPORARY
RESTRAINING ORDER**

Re: Dkt. No. 2

Pending before the Court is Plaintiff Ralph Dominic Vaccaro's ex parte application for a temporary restraining order. Dkt. No. 2. For the reasons detailed below, the application is DENIED.

I. BACKGROUND

On August 21, 2018, Plaintiff, filed a complaint and request for injunction, as well as the instant ex parte application, seeking to enjoin the foreclosure sale of the property located at 1343 Gay Ave, Campbell, CA, 95008 (the "Property"), that is scheduled for August 23, 2018. Dkt. No. 1 ("Compl."); Dkt. No. 2 ("Mot."). The requested temporary restraining order would enjoin Defendant Select Portfolio Servicing, Inc. ("Select Portfolio") from foreclosing on the Property.

Plaintiff alleges that Defendant "[b]roke [f]ederal [f]oreclosure [l]aws" by dual tracking Plaintiff's loan modification and foreclosure of the Property in August of 2017. Compl. at 3, 4. Plaintiff invokes the Homeowners Bill of Rights in this claim, and the Court construes Plaintiff's complaint as an allegation that Defendant violated Cal. Civ. Code § 2923.6 (pre-2018) and/or Cal. Civ. Code § 2924.11 (post-2017) (together, "HBOR Dual Tracking Statutes").

The HBOR Dual Tracking Statutes provide that a lender may not sell a borrower's home in foreclosure while a complete application for a foreclosure prevention alternative is pending. Cal. Civ. Code §§ 2923.6(c), 2924.11(a). Plaintiff alleges that Defendant posted a notice of auction

1 sale on August 30, 2017. Compl. at 4. Plaintiff notes that Defendant notified him that his loan
2 modification had been rejected on August 31, 2017.

3 Plaintiff additionally alleges that on March 23, 2018, Defendant agreed to send a
4 subsequent loan modification application that Plaintiff never received. Mot. at 2. In May, 2018,
5 when Defendant informed Plaintiff that the loan modification application had not been returned
6 completed, Plaintiff contacted Defendant and was sent a new agreement. *Id.* Plaintiff disagreed
7 with certain terms of that agreement and contacted Defendant with questions. *Id.* On May 9,
8 2018, Plaintiff alleges that Defendant gave notice that the loan modification agreement offer was
9 rescinded. *Id.* When Plaintiff again contacted Defendant, he was given twenty-four hours to
10 complete a new application. *Id.* Plaintiff contends that this was insufficient time, and now
11 requests an order enjoining the foreclosure sale of the Property currently scheduled for August 23,
12 2018.

13 **II. LEGAL STANDARD**

14 Under Federal Rule of Civil Procedure 65, a temporary restraining order may enjoin
15 conduct pending a hearing on a preliminary injunction. *See* Fed. R. Civ. P. 65(b). The standard
16 for issuing a temporary restraining order is the same as for a preliminary injunction. *Gonzalez v.*
17 *Wells Fargo Bank*, No. 5:12-cv-03842, 2012 WL 3627820, at *1 (N.D. Cal. Aug. 21, 2012) (citing
18 *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977)).

19 A plaintiff seeking preliminary relief must establish: (1) that he is likely to succeed on the merits;
20 (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the
21 balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter v.*
22 *Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Preliminary relief is “an extraordinary remedy that
23 may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Id.* at 22.

24 A court must find that “a certain threshold showing” is made on each of the four required
25 elements. *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). Under the Ninth Circuit’s
26 sliding scale approach, a preliminary injunction may issue if there are “serious questions going to
27 the merits” if “a hardship balance [also] tips sharply towards the [movant],” and “so long as the
28 [movant] also shows that there is a likelihood of irreparable injury and that the injunction is in the

1 public interest.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

2 **III. ANALYSIS**

3 Plaintiff has not demonstrated a likelihood of success on the merits in his claims against
4 Select Portfolio. Plaintiff’s allegations do not establish a likely violation of the HBOR Dual
5 Tracking Statutes. Plaintiff’s claims regarding an alleged one-day period in August 2017 when
6 foreclosure proceedings had been initiated but before Plaintiff’s application for loan modification
7 had been terminated fail to allege that Defendant “record[ed] a notice of default or notice of sale,
8 or conduct[ed] a trustee’s sale” of the Property. Cal. Civ. Code § 2923.6(c). Indeed, because
9 Defendant is only now conducting a foreclosure sale on the Property, it is evident that Defendant
10 did not complete foreclosure proceedings while Plaintiff’s 2017 loan modification application was
11 pending.

12 Further, Plaintiff’s claim as to the current foreclosure does not allege a violation of the
13 HBOR Dual Tracking Statutes. Plaintiff submits a letter from Defendant, dated August 9, 2018,
14 which confirms Plaintiff’s timeline of events. Mot. at 5–6. The letter indicates that, when
15 Defendant did not receive an executed loan modification agreement in April of 2018, Defendant
16 considered the offer withdrawn and proceeded with foreclosure, as Plaintiff is “30 payments past
17 due” on his loan. *Id.* Plaintiff also submits an unsigned loan modification agreement dated April
18 1, 2018. *Id.* at 11.

19 “With no complete application submitted, the HBOR provides no impediment to
20 foreclosure.” *Valentino v. Select Portfolio Servicing, Inc.*, No. 14-CV-05043-JCS, 2015 WL
21 1906122, at *4 (N.D. Cal. Apr. 24, 2015). Here, Plaintiff does not even allege that Defendant is in
22 receipt of a completed loan modification application that would prevent a foreclosure sale of the
23 Property. Therefore, Plaintiff has not demonstrated any potential for success on the merits of his
24 claims under the HBOR Dual Tracking Statutes.

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Because the test for injunctive relief requires a showing of likelihood of success, the Court does not reach the remaining *Winter* factors. Accordingly, the Court **DENIES** Plaintiff's *ex parte* administrative motion for a temporary injunction and restraining order.

Dated: 8/22/2018

HAYWOOD S. GILLIAM, JR.
United States District Judge